

DEPARTMENT OF STATE REVENUE

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ISSUE

Property Provided With an Operator

Authority: IC 6-2.5-4-10; IC 6-2.5-1-21; 45 IAC 2.2-4-27(d)(4); *Mason Metals Co.*, Ind. Tax Ct., 1992; Information Bulletin #42, June 1995

IC 6-2.5-4-10. Renting or leasing... to another.

(a) A person... is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person.

[1980]

(a) A person... is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease.

[2003]

IC 6-2.5-1-21. "Lease or rental" defined [effective January 1, 2004].

(a) ... "Lease" or "rental" does not include:

....

(3) providing tangible personal property along with an operator for a fixed or indeterminate period, if:

(A) the operator is necessary for the equipment to perform as designed; and

(B) the operator does more than maintain, inspect, or set up the tangible personal property.

....

(d) This section applies only to leases or rental entered into after June 30, 2003, and has no retroactive effect on leases or rentals entered into before July 1, 2003.

[2003]

45 IAC 2.2-4-27(d)(4) Tangible personal property; renting and leasing

....

(d) The rental or leasing of tangible personal property... is taxable.

....

(4) When tangible personal property is rented or leased together with the services of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice....

[Temporary Regulations 2004]

I. GENERAL STATEMENT

The income from lease or rental of tangible personal property is subject to the collection of sales tax by the lessor. Income from the performance of services is not subject to sales or use tax.

Prior to January 1, 2004, transactions which include elements of both taxable lease income and exempt service income must be further analyzed to determine the extent of the parties' right to control the property.

Effective January 1, 2004, property rented or leased with an operator is considered to be a service not subject to sales or use tax if:

- A. the operator is necessary for the equipment to perform as designed; and,
- B. the operator does more than maintain, inspect or set-up the property.

Property rented or leased with an operator is subject to sales or use tax if the operator does no more than set-up, perform maintenance or inspect the property. If the charge for the operator's service is not separately stated, the rental/lease is considered to be a retail unitary transaction subject to sales or use tax on the total amount.

II. DOCUMENTS EVIDENCING LEASE OR SERVICE

The rental/lease agreement is evidence of the intention of the parties. Such evidence can be overcome by proof that the facts and the reality are otherwise. [FN 1] The burden of proving otherwise rests with those seeking to invalidate the written agreement.

Unless either party to the transaction can prove that the substance of the transaction is in fact the provision of an exempt service, the rental of tangible personal property is subject to sales tax.

III. PROPERTY PROVIDED WITH AN OPERATOR – Prior to January 1, 2004

A. Control of Leased Property

45 IAC 2.2-4-27. Tangible personal property; renting and leasing.

(3) Renting or leasing property with an operator:

- (A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised. [1972]

The charge for the lease of tangible personal property including any unstated charge for the services of an operator is entirely subject to sales tax if the lessee maintains "control" over the property during its intended activity.

B. Performance of a Service

45 IAC 2.2-4-27. Tangible personal property; renting and leasing.

(3) Renting or leasing property with an operator:

- (B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease

provided the lessee cannot exercise control over such property and operator. [1972]

The distinction between A, a taxable transaction for rental of tangible personal property including the unstated charge for the services of an operator and B, an exempt transaction for the performance of a service which requires the services of an operator, is the right of the parties to “control” the operation of the property.

C. Lease of Property with an Operator

45 IAC 2.2-4-27. Tangible personal property; renting and leasing.

(3) Renting or leasing property with an operator:

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

[1972]

If the lessee maintains “control” over the leased tangible personal property, any separately stated charge for the services of an operator is exempt. If such charge is not separately stated to the lessee, the entire lease charge is a unitary transaction subject to sales tax.

IV. INDICATORS OF “CONTROL” OVER PROPERTY [FN 2]

1. Employment of the driver or operator.
2. Command over the activities of the property including the route (if movable), time of operation, most efficient method of operation, idle time, units of production, et al.
3. Obligation to pay operational costs and required maintenance and repairs.
4. Payment of fuel costs.
5. Responsibility to secure equipment when not in service.
6. Obligation to pay insurance and obtain government permits as required.

A determination of the party possessing “control” over property is not limited to the above factors; however, the existence of any one or more of the factors supports a rebuttable presumption.

V. PROPERTY PROVIDED WITH AN OPERATOR – effective January 1, 2004

A. Property rented or leased along with the services of an operator is not subject to sales or use tax provided:

1. the operator is necessary for the equipment to perform as designed; and,
2. the operator does more than maintain, inspect, or set-up the tangible personal property.

B. When the lessor provides the services of an operator to simply set-up, provide maintenance and/or inspect the property, the rental or lease is considered to be a taxable retail transaction. To be exempt from sales or use tax, the charge for the operator's services must be separately stated on the invoice. If not separately stated, the rental/lease is considered to be a retail unitary transaction subject to the collection of sales or use tax on the total charge.

C. The renting or leasing of a vehicle together with an operator, regardless of extent of control exercised, is not subject to sales or use tax if the vehicle is directly used in the rendering of public transportation. [FN 3]

D. Long-term rentals or leases entered into prior to December 31, 2003 are not subject to the provisions of IC 6-2.5-1-21.

[FN 1] See *Meridian Mortgage Co.*, Indiana Appeals Court, 1979.

[FN 2] See *Mason Metals Company, Inc.*, Ind. Tax Ct., 1992 quoting *Indianapolis Transit Sys.*, Ind. App. 1976.

[FN 3] 45 IAC 2.2-5-27(d)(5)